IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. SCHOENWALD and S. T. HILLS, as Receivers and Assignees of the Pacific Coast & Norway Packing Company, a corporation,

Plaintiffs in Error,

v.

HARRY A. BISHOP, as United States Marshal for the first division of the district of Alaska, and D. N. McDONALD,

Defendants in Error.

No. 2817

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF ALASKA, DIVISION NO. 1.

Reply Brief of Plaintiffs in Error

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We admit the statement in the first heading of argument in defendants' brief to be law (br. p. 5). But it refers to "statutory and invol-

untary assignments," whereas the case at bar concerns a voluntary common law assignment.

Under this first heading, however, counsel deals with questions having no relation to it. The first is whether the transfer here was the corporation's act. We agree we must show a good title, as counsel contends (ans. br. pp. 6, 7), and in our brief (pp. 9 to 17) we show that the assignment made by the company's president under its seal was its act because approved and acquiesced in by the directors and stockholders, citing numerous authorities to show that even silent acquiescence is sufficient. In this case not only was there acquiescence by the directors and stockholders, but there was consideration of the matter by them in advance, express approval, and cooperation by the company in obtaining the order relating to the transfer. The testimony and the order on its face show that the company consented and cooperated—the testimony is uncontradicted, and the recital of the order clinches it.

Friedman v. Lesher, 64 N. E. (Ill.) 736, is cited as adverse to us (ans. br. p. 7). There immediately upon the death of the president of the company the vice president, without any authorization and without any exigency calling for the act, or any motive except to defeat the preference of a judgment note, executed an assignment in the company's name. There was no ratification of any kind until after

the note had been reduced to judgment and its lien had attached. The court did not decide that ratification did not validate the act, or consider what would amount to ratification, but simply that it would not apply the doctrine of relation back to defeat a lien already attached. In the case at bar the ratification by approval and consent was at the time of the transfer and there were several months of acquiescence before the defendants in error levied the attachment. We agree "the general rule is that a corporate assignment must be executed by the board of directors" etc., but we have shown an exception to the general rule.

In the next case cited, *Calumet Paper Co. v. Haskell,* 144 Mo. 331, as is stated there was some evidence to show ratification of the assignment by the stockholders, but it is not shown what the evidence was and the court does not find whether it was sufficient or not. We admit the doctrine of the quotation from this case that we were obliged to show at least an assignment valid on its face, and that when not made by the directors at a duly convened meeting an assignment may be impeached by creditors or stockholders *"when such an assignment has not been validated by acquiescence or laches."* But the act here *was* validated by approval and acquiescence. A creditor of course can show that there was *no* assignment—no act by the corporation; but when a corporation adopts an act—makes

it its own by approval and acquiescence, then a creditor cannot object to or take advantage of the irregular manner of the corporation's action. He may show that an assignment was no act of the corporation; but when it is the act of the corporation by approval and acquiescence, he cannot impeach it by showing that it was an irregular act. Counsel's authority clearly implies this and our numerous authorities are squarely in point.

The sufficiency of our evidence to show acquiescence is questioned (ans. br. p. 9). Counsel however is much mistaken as to what the evidence was on the point. We showed that the company itself, its directors and stockholders, initiated the receivership proceedings, and arranged a friendly suit to carry out their plans (dep. Kells, rec. p. 66, Steberg, rec. p. 83); that the transfer was made because the control of the company's affairs by the receivers at Seattle was desired by both the directors and stockholders, and "*it* (the transfer) *was approved and acquiesced in by both*" (dep. Kells, rec. pp. 69-70). "Everybody desired this and approved of transferring the Alaska assets to the receivers. All the directors approved of this, and so far as my knowledge went all the stockholders did. I personally know that a large majority of the stockholders did" (dep. Steberg, rec. p. 84). And note the testimony of the other witnesses to the same effect (dep. Smith, rec. pp. 95-96; Schoenwald,

rec. pp. 153-154). Remember that the defendants in error offered no testimony, and so this all stands undisputed. And it will be remembered that the order relating to the transfer recites the consent of the company by its president, which conclusively shows the company's approval. This evidence puts our case in altogether a different class from that of *Doernbecher v. Co.,* 28 Pac. 899, cited in answer brief p. 9. We admit its authority for the proposition that a creditor can show there was no act of the company, but we repeat our case is one in which the corporation made the president's act its own by approval and acquiescence. Its manner of acting may have been irregular, but that is of no concern except to its members, who in this case have approved and acquiesced.

Subhead "B," ans. br. p. 10, announces that a transfer in a receivership proceeding to the receivers pursuant to an order of court is not a voluntary assignment. No authority cited by counsel prounds any such doctrine. Our case of *Ward v. Mfg. Co.,* 41 Atl. 1057, is to the contrary. There a transfer was made (to use counsel's words) "in a receivership proceeding by a corporation to its receivers pursuant to an order of the court," and the transfer was held voluntary and binding as "an exercise of the *jus disponendi* which is incident to ownership." So far as we can learn not court has questioned the authority of that case. It was urged

and considered before the C. C. A. 6th Circuit, in the case of *Zacher v. Co.,* 106 Fed. 593, and the court did not distpue its soundness.

Counsel remarks (p. 11) that the company here did not confess judgment and did not permit default to be taken against it. The first might have been an act of bankruptcy, and the latter would have required time. Instead an answer was filed which did not deny one material allegation bearing on the question of the appointment of a receiver, *but admits everything which the court recites as the basis of its order appointing a receiver* (rec. pp. 179-181). The record shows that the complaint and answer and the order appointing the receiver were all filed the same day, thus confirming what the testimony shows, that the suit was a prearranged friendly proceeding.

We do not question that as a memorial a record is conclusive. The rule in all its phases is found in Bigelow on Estoppel 5th ed. p. 35. Counsel's cases cover but one aspect of it. But we are not questioning anything shown by or recited in the record. We supply facts not of record concerning transactions prior to the court proceedings and leading up to the record. Everything in the record is consistent with the proofs that the company desired to distribute its assets through a receiver and arranged to have Nevin go into court and make the applica-

tion, thus itself voluntarily initiating the proceedings. In fact the record confirms this since, as said, the company's answer admitted everything which the order recites as a basis for appointing receivers, and the pleadings were filed the same day, and the receiver at once appointed, showing prearrangement and cooperation. The testimony and record confirm each other and show that the proceedings were initiated by the company prior to the application in court, which was but an intermediate step, and that the company by this means "placed the goods which were [the receivership's] subject precisely where the defendant wished to have them placed—at the disposal of one representing primarily all its creditors, and secondarily, all its shareholders." This, the Ward case decides, stamps the proceedings as voluntary and a transfer, although by the court's order within the proceedings, also voluntary and binding as a free exercise of ownership.

Of course we do not deny what the record shows, that Nevin a creditor made the application, but the further established fact is that prior to this the company desired a receivership, planned to have one and arranged with Nevin to accomplish this purpose, and he went into court at its instance. In short, the receivership, just as the record shows it, was a part of the company's plan. Having willed and initiated the proceedings, it willed everything in them.

In the Ward case a transfer ordered by the court in the receivership proceedings was held voluntary. True the proceedings there were begun by stockholders. So were they here—by all the stockholders and directors—if the court will but look at the whole history of the matter. And why should it not? The company's voluntary participation was but one step further back. A creditor went into court but as the company's friend, at its instance and with its cooperation. This makes no difference in principle —in both cases the corporate will was accomplished by operations initiated by its voluntary act. (Rec. pp. 66, 83.)

We ask that it be remembered, however, that even were the receivership involuntary the evidence shows the transfer of the Alaska assets was voluntary. No such transfer was required or authorized by the statutes of Washington as part of the receivership proceeding. From this fact and the fact that the assets were in Alaska, it is almost a necessary inference tha the court would not and perhaps could not order such a transfer without the company's consent.

At the risk of needless repetition, let us remark once more that we do not question anything in the record with reference to this transfer, as counsel would have the court believe (ans. br. p. 14). We show first that the receivership had operated a con-

siderable time before the transfer of the Alaska assets was thought of, that the company desired to have the Alaska assets also equally distributed to its creditors, and the expedient of a common law transfer for their benefit was decided upon. Had the company chosen some one else as assignee no one could have questioned that the transfer was voluntary. What difference can it make if the company naturally chose the receivers because they could economically handle the Alaska assets in unison with the Washington receivership? Having decided on the transfer and chosen its assignees, the company's president met with the receivers and arranged the details, and the deed and bill of sale were put in process of preparation. All this took place without any court order—in complete independence of the Washington court or statutes. At this stage, however, it was considered that since the receivers were to be assignees the court of their appointment should sanction an arrangement which would vest in them duties and responsibilities outside of those necessary or usual to their office. And so while the instruments were being prepared the company by its president and the receivers went into court and the latter asked for and the company consented to an order covering the transfer, whereupon it was entered. No part of the record except the order at all pertains to the transfer. What have we questioned in the order? We admit the re-

ceivers asked for it. We merely show that this was in accordance with a prearrangement initiated by the company, and that the company was present and cooperating in obtaining the order, which fact the order shows on its face. We admit that the order directs the transfer, but simply show that such an order was desired and arranged for by the company itself, and that it consented to and cooperated in obtaining such an order so that it might accomplish its desired purpose. In short the order was only one of the later steps in the plan of the company to dispose of its Alaska assets, as it freely desired, for the equal benefit of its creditors. This plan was made and was being executed independently of the receivership before any order was entered, and the only point of contact with the receivership was this order, which was not a required or usual part of the proceeding, but was only entered because the company wished the receivers to cooperate with it in accomplishing a purpose beyond the power and scope of the receivership itself. For the evidence see rec. pp. 68-9, 70, 73, 76, 79, 84, 87, 94, 95, 96, 99, 154-5. When we have shown this have we contradicted anything in the order, and have we not shown the transfer is a free exercise by the company of its right of ownership? The fact that the transfer was not provided for or made in accordance with any requirement of law, and that the order on its face shows its voluntary nature, distinguishes our case from

the Kentucky cases relied on by counsel (ans. br. pp. 17-18), where the state court especially notes that the order did not purport to be a consent order. (*Zacher v. Co.*, 59 S. W., see p. 495, col. 2.)

We repeat that whether the receivership was voluntary or not, the transfer which has only an accidental connection with it was voluntary, and being a common law assignment—not statutable—it was universally binding. The fact that the court through its receivers would have control over the assets after the transfer was made, which is urged by counsel (ans. br. pp. 15-16) has no bearing. Even where a statute provides for the disposition of assets after an assignment is made, if it does not provide for the assignment itself, it is a common law transfer and binding as a free act of ownership. *In Re Farrell,* 176 Fed. (C. C. A. 6th Cir.) 505, at pp. 510-11, squarely decides this. And *Ward v. Company, supra,* decides that a transfer is voluntary and binding universally "if it placed the goods which were its subject precisely where the defendant wished to have them placed—at the disposal of one representing primarily all its creditors" etc. And in *Whitman v. Mast,* 11 Wash. 318, 326, the court distinguishing between voluntary and involuntary assignments says:

> "In the one case the assignor's property is placed in the hands of a third party by his own act and with his consent; in the other it is placed

> in the hands of a third party by operation of law and without his act and against his consent. The subsequent control by the court under stautory regulations does not destroy this distinction. Whether or not an assignment is a voluntary conveyance by the assignor must be decided from a consideration of the manner in which the transfer of the property is made, and not what may be prescribed by the statute as to the manner in which the property is to be disposed of by the assignee after assignment."

We dispute very little found in the answer brief between pp. 19 and 25 inclusive. *Security Trust Co. v. Dodd,* quoted p. 19, concerned a statutable assignment. All the cases under the heading "C" (pp. 20-22) concern the authority of a receiver merely as such. Heading "D" (p. 22) and the authorities cited under it, as the heading imports, concern statutable assignments.

We admit that a receiver merely by virtue of his appointment has no extra-territorial authority. But it must be remembered here that the receivers took *possession* of the Alaska assets immediately upon their appointment (rec. pp. 67, 93, 152), and *even though no transfer at all had been made to them,* no one unless with a better title could defeat their possession. In *Sands v. Greeley & Co.,* 88 Fed. (C. C. A. 2nd circuit) 130, the court says:

> "When property in another state has actually been reduced to his possession, he can stand upon his possessory title, and defend his rights against

> all others who cannot prove a better title. It is only when he is compelled to resort to the courts to obtain possession of assets that he must rely upon that principle of comity upon which alone his title rests." (P. 132.)

See also High on Receivers (4th ed.) pp. 68-69.

We admit that an assignment *under a statute* whether made voluntarily or involuntarily can demand recognition only in the state where the statute has force. We do not claim that a statutable assignment even though voluntarily made must be generally recognized. If the transfer is provided for by statute and is made under and in accordance with the statute, it can command only local recognition. Such a case must be distinguished from one in which the statute *does not provide for the assignment,* but only takes effect when an assignment has first been made. See *In Re Farrell, supra.*

Our case, however, is not one in which the receivers are claiming recognition in Alaska by virtue of their appointment, but are claiming both by virtue of their actual possession and as owners of the property under a common law transfer. The undisputed testimony is that the transfer here was not provided for or made under any statute (rec. pp. 73, 99). Counsel's numerous cases, therefore, dealing with the powers of receivers merely by virtue of their appointment and with statutable assignments, whether voluntary or involuntary, have no application here.

Our position here is that the receivership was voluntary and the transfer was therefore voluntary, and that since the transfer was not provided for and not made under any statute, it was a voluntary common law transfer, universaly binding, even though made as part of the receivership proceedings; but that as a matter of fact the transfer had only an accidental connection with the receivership proceeding and was itself voluntarily made whether the receivership was voluntary or not. Being voluntary and not statutable it must be recognized in Alaska.

The proposition at the top of page 25 of the answer brief, in the broad form in which it is stated, is not supported by any of the authorities cited for it, and the Ward case, *supra,* is a direct refutation of it. Counsel states in the middle of that page "that a conveyance made pursuant to an order could have no wider extra territorial effect than the order itself." It is well known, however, that when a court directs the execution of a deed in specific performance of a contract, the deed is binding as though made freely without any court order, presumably because the court merely compels the execution of a duty voluntarily assumed, and the deed is voluntary though the court order directs the making of it, since the maker voluntarily assumed the duty of making it.

So the Ward case is authority for the proposition that where the receivership is a voluntary proceeding a transfer in it, although directed by the court, partakes of the nature of the receivership and is likewise voluntary and binding as a free act of ownership. Our case is much stronger than the Ward case, since here not only was the receivership initiated by the company itself, but volition was again exercised independently of the receivership proceeding when the company freely planned and executed the transfer, enlisting the cooperation of the receivers to go into court with its president for an order in the premises.

Now the authorities cited in support of defendant's contention stated at the top of p. 25 of their brief. A quotation is first made from High on Receivers, but the author is clearly referring to compulsory assignments by the corporation to the receivers, in so much as the only authority for the statement is *Catlin v. Company,* upon which also the answer brief expressly relies. In the Catlin case the receivership was involuntary, and the transfer to the receivers compulsory. The owner exercised no volition as to either. The case merely decides that "a court cannot extend its jurisdiction by the appointment of a receiver, so it is equally powerless to do so by coercing an assignment of the property in controversy." We have no quarrel with this

holding. The court there pointed out the law which we maintain controls here, namely:

> "The voluntary transfer of a chattel by the debtor, if it is not forbidden in other respects by the law at the place of the situs, is to be as much regarded there or elsewhere as it would be at the place of the domicile."

The court further distinguished the two in these words:

> "Involuntary assignments which are made under foreign insolvent laws have no operation outside of the state under whose laws they are made, while a voluntary assignment is a personal, common-law right, possessed by every owner of property, and may operate in one state as well as another."

With reference to the section which defendants quote and rely on, Judge High points out "the rule above announced has reference to cases of ordinary receivers appointed under general chancery powers, where the receiver is vested with no sort of legal title, but is regarded as a mere custodian of the fund or property while it remains under the control of the court" (§241-A). He further points out (§244) that where the receiver has title of any sort, a different principle applies from that quoted in defendants' brief from §240.

The quotation from Cyc. on p. 26 of the brief expressly refers to involuntary assignments, and the two Kentucky cases on which counsel so much rely

do not sustain the proposition for which counsel cites them. The Huntington case (98 Fed. 464) was decided on the following ground:

> "There having been in effect no voluntary assignment either made or authorized by the corporation for the benefit of creditors, but only an assignment worked out through the operation of the judicial decree of the court in Connecticut *under the statute of that state,* it is precisely equivalent to a statutory assignment by the company under the insolvency laws of Connecticut regarding corporations."

The intimation is that had there been a voluntary assignment of the company, not under a statute, it would be recognized.

The Zacher case next cited (a state court case involving the same matter) decided that:

> "The proceeding in Connecticut was a *statutory one* for winding up the affairs of an insolvent corporation under the laws of that state, and is operative as to property in Kentucky only so far as the courts in this state choose to respect it" (59 S. W. 495, col. 2).

And the court intimates that had the judgment purported on its face to have been "a consent judgment," as the order here recited, a different case would have been presented. The undisputed testimony in the case at bar is that the transfer was not made under any statute, and the order relating to it on its face shows it was made with the consent of the company.

The next contention in the answer brief is that comity will not be extended where not reciprocated (p. 26), and counsel cites two Washington cases to show that an assignment of the kind in question, if made in Alaska, would not be recognized in Washington. However, neither Washington case cited involves an assignment like that here in question. The first case, *Happy v. Prickett,* 24 Wash. 290 (64 Pac.), involved an "assignment made in Illinois in accordance with the statutes of Illinois" (p. 292); and in the second case, *Bloomingdale v. Weil,* 29 Wash. 611 (70 Pac.) "the assignments were made under the provisions of and in compliance with the statutes of the state of New York" (p. 613). The case of *In re John L. Nelson & Bro. Co.,* cited by defendants' brief (p. 28) in this connection, involved "a deed of assignment for the benefit of creditors, pursuant to the statutes of Illinois" (p. 591). We freely agree that in cases of statutable assignments, voluntary or involuntary, no recognition need be extended in foreign jurisdictions whether there is reciprocity or not; and this is really all that the defendants' citations hold.

The next point in defendants' argument is that a voluntary common law assignment only receives recognition in other states as a matter of comity (p. 29). If by this counsel means that a state by legislation may supersede the common law and deny

effect to such assignments, his authorities support him, and we never disagreed. But he must and does claim more. First he is mistaken (p. 29) in considering that our position as to the binding effect of such assignments depends upon "the theory that the situs of the personal property is the domicile of the owner." Our position is that a voluntary common law assignment, no matter where made or where the property is situated, must be recognized everywhere, except where the common law has been superseded by statute or established public policy. In this, defendants' citations sustain us, not them. The doctrine in *Green v. Van Buskirk,* 5 Wall. 307, 18 L. ed. 599, first cited is to the effect that such assignments will be recognized unless "the statutes of the country where property is situated or the established policy of its laws prescribe to its courts a different rule"; and later, "no one can seriously doubt that it is competent for any state to adopt such a rule *in its own legislation,* since it has perfect jurisdiction over all property, personal as well as real, within its territorial limits." See 18 L. ed. 600, col. 2.

The case of *Disconto Gesellschaft v. Umbreit,* cited on p. 31, is not at all in point, instead of being identical as the brief contends. The contest there was between two lien claimants over property admittedly that of a common debtor, and the debtor and one lien claimant were German citizens. Besides the German lien claimant really represented

the bankruptcy court in Germany, and the law there provided:

> "Pending the bankruptcy neither assets nor any other property of the bankrupt are subject to attachment or execution in favor of individual creditors" (52 Law ed. 628, col. 1).

It may very well be that international comity applies in such a case, where the contest is between a citizen of Germany and a citizen of one of our states, as to whose lien on a common debtor's property is to be given priority. But here the contest is between citizens of the U. S. and the question is whether a common law title given in one state of the union will be recognized in another.

> "The effect of such a [voluntary common law] transfer on goods in another state is not to be determined simply by the rule of comity which is applicable to extra-territorial assignments by operation of law, but rests on the general principles of jurisprudence as to the right of everyone to dispose of what he owns. *Egbert v. Baker,* 50 Conn. 319, 20 Atl. 461; *Bank v. Walker,* 61 Conn. 154, 23 Atl. 696." *Ward v. Co., supra.*
> In *Security Trust Co. v. Dodd,* 43 L. ed. 835 (173

U. S.), so much relied on by counsel, *Oakey v. Bennett,* 11 How. 33, is quoted as follows:

> "A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity," etc.

The implication being that if the transfer were not statutable its recognition would depend upon law and not comity.

Only a few of the cases cited in our brief, pp. 28-37, holding that a voluntary common law assignment in one state will be recognized as binding in other states even as against local creditors, are criticised by defendants (ans. br. p. 32). We shall not therefore give space to showing further that the criticisms made for the most part do not affect the principle involved.

The holding of the lower court on this point, and defendants' case, rests wholly upon the case just mentioned of *Security Trust Co. v. Dodd,* 173 U. S. 625, 43 L. ed. 835 (ans. br. pp. 33-38). Need anything more be said of this case than that it had no concern with *common law assignments?* Assume that the court meant what counsel and the lower court consider it meant, when speaking of common law assignments, yet the statement was mere dictum — a dictum of uncertain meaning, matched against the decisions of all the state courts with the exception of Maine and Illinois; against the decisions of the federal courts and all other decisions of the Supreme Court itself—a dictum which with the meaning ascribed to it is inconsistent with the cases cited by the Supreme Court as supporting it, as well as with its subsequent adjudications.

What the Supreme Court *decided* in the Dodd case was this, in its own words:

> "We are therefore of the opinion that the *statute of Minnesota* was in substance and effect an insolvent law; was operative as to property in Massachusetts only so far as the courts of that state chose to respect it, and that so far as the plaintiff, as assignee of the D. D. Merrill Co., took title to such property, he took it subservient to the defendant's attachment."

The decision thus concerns merely a statutable assignment, and accords with our contentions.

If the Supreme Court meant by the dictum relied upon that common law and involuntary and statutable assignments are in the same class so far as citizens of another state are concerned, why does it devote several pages to a consideration of the nature of the assignment there, and deem a decision of this question necessary to a determination of the case? Manifestly the court meant no more than what it laid down elsewhere in the opinion (p. 839, col. 2):

> "A title to personal property acquired under such laws (insolvency statutes of other states) will not be recognized in another state when it comes in conflict with the rights of creditors pursuing their remedies there against the property of the debtor,"

but that a common law assignment will be recognized unless creditors have prior liens or other legal

rights, or unless it conflicts with local statutes or established public policy. There is no such conflict here.

Neither of the first two authorities referred to by defendants on p. 36 attempts to *construe* the supreme court's meaning in the dictum relied on. They merely set forth what the court said. Nor do the remaining cases support the defendants, unless possibly the first two which are Illinois cases, where our rule is departed from, as said. The case of *Shinler v. Israel* uses the uncertain expression "rights of local creditors" without any suggestion that local creditors have rights except under laws or established public policy. 3 Amer. & Eng. Enc. (2nd ed.) 49 says rightly that a voluntary assignmen will not be enforced by a state "if opposed to its laws or public policy." The case of *Faulkner v. Hyman* apparently concerns a statutable assignment; if not it is in conflict with the later Massachusetts cases (see our brief p. 34). The next case cited is concerned with matters of comity which, as said, are not relevant here. And with respect to that case and the dictum in the Dodd case. we say of course every state "will protect the *rights* of its own citizens" whether threatened by citizens of other states or by fellow citizens; but our whole contention is that McDonald has no *"right"* to have a common law transfer ignored since it does not conflict with any statute or established public policy in

Alaska. We ask the court to say with Judge Field (later chief justice of Massachusetts):

> "We do not give effect to a foreign law prejudicial to our own citizens. We give effect to an assignment which is good against the plaintiff in this action by our own law." (*Train v. Kendall,* 137 Mass. 366.)

Defendants' conjecture (br. p. 37) that we consider an attempted rule unconstitutional merely because by its application one creditor would obtain more than another is absurd. Our position is simply that to hold an assignment without force in Alaska when its citizen is suing, and binding if a citizen of another state is suing, is unconstitutional. The case of *Belfast Savings Bank v. Stowe,* 92 Fed. 100. (C. C. A.) parallel in its facts to the one at bar, so decided, and held that *Blake v. McClung,* 176 U. S. 59, is in point and controlling. Counsel does not attempt to distinguish the Belfast Savings Bank case from the one at bar, but claims the case of *Blake v. McClung* was overruled by the Disconto Gesellschaft case. The case of Blake v. McClung and the Belfast Savings Bank case were involved with the constitutional principle forbidding discriminations between citizens of the several states. How could the authority of these cases be affected by the Gesellschaft case, which was solely concerned with a contest between a citizen of Wisconsin and a citizen of Germany? Besides, the German cor-

poration's authority was no greater than that of a mere receiver from a foreign state since it appeared as the representative of the German Bankruptcy Court, and the laws there, as said, expressly provided that in Germany the company had no standing in its own right. Where the only question involved is whether a German citizen will be allowed a prior lien over a citizen of Wisconsin claiming against the same debtor, whose title to property is not in dispute, the case is of course one for the application of international comity; but we repeat that where the question is whether a common law transfer made in one state of the union will be recognized in another having no conflicting statutes, that question is not one of comity at all, but of enforcing the common law of both jurisdictions.

We have already noted that the Washington case cited on p. 43 of the brief concerned a statutable assignment. The next two cases cited are from Illinois, which with one or two other states holds the exceptional doctrine. The case of *Bizzell v. Bedient,* next cited, concerned a statutable assignment under the insolvency laws of New York. The citation from Cyc refers simply to the powers of receivers by virtue of their appointment. We admit the rule quoted at the top of p. 44, but we are asking to have defendants' rights declared as a matter of law, not seeking to contravene any rights they have by the application of comity.

NON-RECORD OF ASSIGNMENT.

The statute, R. S. §4192, 7 Fed. Stats. Ann. 42, provides with reference to vessels for recording "in the office of the collector of customs where such vessel is registered or enrolled." Obviously the statute refers only to registered or enrolled vessels, as was held in *Thurber v. Sloop "Fannie,"* 23 Fed. Cas. No. 14014. See 25 Am. & Eng. Enc. of Law (2d ed.) 877, for cases collected. Defendants in error do not claim the Bernice is either registered or enrolled, and the statutes do not contemplate that a vessel under 20 tons shall be enrolled. R. S. §§4311, 4331 and 4371, 7 Fed. Stats. Ann. pp. 56, 63 and 76 respectively. Counsel contends that the Bernice must be classed as "enrolled *and* licensed" because there are only two classes of American vessels "those registered and those enrolled *or* licensed." We do not see that a class of vessels "enrolled *and* licensed" is one of the two mentioned. The contention apparently is that although the Bernice is not enrolled and licensed (only the latter) yet it must be classed as enrolled and licensed, contrary to the fact, and although this is not one of the two classes of American vessels mentioned by counsel.

Not only has it been held, as shown, that the statute only applies to registered or enrolled vessels, but also that it was designed to protect persons who have actually dealt on the faith of the record

title, and as to whom it would work a fraud to admit unrecorded titles to their detriment. It *does not enable mere attaching creditors to oppose equities which are valid against their debtor. Ft. Pitt Nat'l Bank v. Williams,* 42 La. Ann. 418. Defendants in error are mere attaching creditors. They advanced nothing on the faith of the record. Even had they parted with something of value, it is not claimed that they examined the records, or that they knew what the records showed, or at all acted in reliance upon the record title. In fact, the evidence shows that months before the attachment was made McDonald's attorney was informed that the transfer was then about to be made. He certainly was sufficiently informed so that it cannot be said that without further inquiry he acted in good faith in assuming that no assignment of the property had been made by the Pacific Coast & Norway Packing Co. (Rec. pp. 125, 129, 135, 136, 140 and 143.)

Not only did the defendants in error have notice that a transfer was to be made and presumably had been made long before their attachment; but also the receivers as assignees had held possession of and used all the properties for months before the attachment was made. Certainly this was sufficient to put defendants in error upon notice as to the assignees' claim of title.

Except this provision for recording instruments affecting the title to enrolled and registered vessels, there is no requirement for recording in order to protect title. There are provisions for changing the registry, enrollment or license upon sale, but there is no provision that a sale shall be invalid if this is not done. In fact with respect to enrolled and licensed vessels no penalties whatever are prescribed (36 Cyc. pp. 15-16), and these provisions as to change of registry, enrollment or license have no effect upon the validity of transfers of vessels. 36 Cyc 27.

While we are clear that the point is without force for the above reasons, we also urge that defendants are not entitled to raise the point here.

When plaintiffs' witness testified that the "Bernice" was neither registered nor enrolled, weighing only 11 tons (rec. p. 111), defendants' counsel objected to the answer on the ground that it was incompetent, irrelevant and immaterial, and the answer was stricken upon that ground (rec. 73). Certainly, after this defendants are estopped to raise a point in their brief to which this evidence is relevant and material. The court will note too that the lower court merely found that the bill of sale was not recorded. It did not find that there was any provision for record, or conclude that the instrument was invalid because not recorded, and defend-

ants in error asked for no such findings or conclusion. The court in its long opinion makes no mention whatever of this point. Defendants in error are now raising a point, evidence concerning which they considered irrelevant and immaterial at the time of the trial, and concerning which they asked no findings or conclusions, and the court made none.

CONCLUSION.

The Pacific Coast & Norway Packing Company endeavored by instigating the receivership to have its assets in the state of Washington equally distributed among its creditors, and by means of the transfer to make the same disposition of its Alaska assets. Its desire was that there should be no inequality or injustice among its creditors in sharing its property. The defendant McDonald is the only creditor who has sought to be paid in full regardless of the fate of the other creditors. The evidence is all that the transfer was a voluntary common law assignment, and there is nothing in the law of Alaska which affects the binding force of such a transfer.

We respectfully submit the judgment should be reversed.

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